



Civil and Administrative Tribunal New South Wales

Case Name: **Pan v St George Design & Construction Pty Ltd**

Medium Neutral Citation: [2025] NSWCATCD

Hearing Date(s): 6 May 2024; submissions to 29 July 2024

Date of Orders: 28 May 2025

Date of Decision: 28 May 2025

Jurisdiction: Consumer and Commercial Division

Before: G Sarginson, Deputy President

Decision:

- (1) The respondent, St George Design & Construction Pty Ltd, is to perform the works set out in Annexure A of this decision at the residential premises of the applicants with due care and skill by 3 months from the date of this decision (the rectification works).
- (2) The applicants are to give the respondent and its sub-contractors reasonable access to the premises so that the rectification works can be performed.
- (3) The respondent is to pay the applicants' costs of the proceedings as agreed or assessed.
- (4) If either party seeks to vary order (3) above (the costs application):
 - (a) the applicant to the costs application is to lodge and serve the costs application, including submissions limited to 3 pages and any evidence in support, within 7 days of this decision;
 - (b) the respondent to the costs application is to lodge and serve any submissions limited to 3 pages and any evidence in response within 14 days of this decision;
 - (c) the applicant is to lodge and serve any submissions in reply limited to 2 pages within 21 days from the date of this decision;

(d) the parties are to indicate in their submissions whether a consent to an order dispensing with an oral hearing of the costs application, and if they do not consent, submissions of no more than one page as to why an oral hearing should be conducted rather than the costs application being determined on the papers. If a hearing is not dispensed with, the parties will be advised of the date for the hearing of the costs application.

Catchwords:

BUILDING AND CONSTRUCTION – Home Building Act 1989 (NSW) – s 18E Home Building Act 1989 (NSW) – major defect – whether defects are major defects – appropriate method to rectify

BUILDING AND CONSTRUCTION – Home Building Act 1989 (NSW) – successor in title – extension of statutory warranties – knowledge of owner when purchased property – extent and nature of defects at date of purchase - causation

Legislation Cited:

Civil and Administrative Tribunal Act 2013 (NSW)
Civil and Administrative Tribunal Rules 2014 (NSW)
Home Building Act 1989 (NSW)

Cases Cited:

Allianz v Waterbrook [2009] NSWCA 224; (2009) 15 ANZ Insurance Cases 224
Catapult Constructions Pty Ltd v Denison [2018] NSWCATAP 158
Crystele Designer Homes Pty Ltd v Wood [2024] NSWSC 1438
Deacon v National Strategic Constructions Pty Ltd; National Strategic Constructions Pty Ltd v Deacon [2017] NSWCATAP 185
Deaves v Sigma Group NSW Pty Limited [2023] NSWCATAP 94
Deaves v Sigma Group NSW Pty Limited [2023] NSWCATAP 94
Fisher v N Phillips and M Phillips t/as Arise Building Services [2022] NSWCATCD 80
Gittany v Keusma [2021] NSWCATAP 264
GMI Construction Pty Ltd v Keshavaraz [2024] NSWCATAP 68
Kurmond Homes Pty Ltd v Marsden [2018] NSWCATAP 23
Leung v Alexakis [2018] NSWCATAP 11
McIntosh v Lennon [2023] NSWCATAP 83

The Owners Strata Corporation Strata Plan No
63341 v Malachite Holdings Pty Ltd [2018]
NSWCATAP 256
The Owners-Strata Plan No 87003 v Raysons
Constructions Pty Ltd [2025] NSWSC 66
Vella v Mir [2019] NSWCATAP 28
Walker Group Constructions Pty Ltd v Tzaneros
Investments Pty Ltd [2017] NSWCA 27; (2017) 94
NSWLR 108
Wells Group Pty Ltd v Betts [2025] NSWCATAP 70

Texts Cited: None cited

Category: Principal judgment

Parties: Geoffrey Pan and Huiqing Zheng (Applicants)
St George Design & Construction Pty Ltd

Representation: Counsel:
G Adams (Respondent)

Solicitors:
Birch Partners (Applicants)
Fortis Law (Respondent)

File Number(s): 2023/00406855

Publication Restriction: Nil

REASONS FOR DECISION

- 1 This is an application by successors in title (Mr Pan and Ms Zheng) brought against the original builder of a residential dwelling (St George Design & Construction Pty Ltd) for breach of the statutory warranties under s 18B of the *Home Building Act 1989* (NSW) (HB Act).
- 2 In this decision, any reference to “the owners” is a reference to the applicant; and any reference to “the builder” is a reference to the respondent.
- 3 The residential premises are a free standing two story dwelling located in a northern suburb of Sydney, NSW. The dwelling includes a “granny flat.”
- 4 Both parties are legally represented in the proceedings. At the hearing, the applicants were represented by Mr Birch, Solicitor, and the respondent (the builder) represented by Ms Adams of Counsel, instructed by Fortis Law.
- 5 Tribunal proceedings were commenced on 2 March 2023.
- 6 It is conceded in the Points of Defence that the respondent was, at all material times, a licensed builder who constructed the residential premises for the previous owner Mr Harb.
- 7 A final Occupation Certificate was issued by a private certifier in respect of the construction of the dwelling on 23 July 2020.
- 8 The applicants purchased the dwelling from the previous owner in about April 2021. Since about November 2020, the dwelling has been rented to Mr Privan.

Background

- 9 Immediately before purchase of the property, the applicants engaged a building consultant expert, Mr Xue, of Jim’s Building Inspections, to prepare an expert report to identify any defects in the residential premises (pre inspection report). Mr Xue inspected the property on 16 April 2021.

10 Mr Xue provided an expert report dated 19 April 2021. That report is relatively brief, and does not identify the cost of rectification of defects. Mr Xue states in the report that costings are not provided unless a separate report is engaged. However, the defects identified by Mr Xue are as follows:

- (1) Blocked weepholes at brickwork on left-side exterior walls.
- (2) Masonry overhanging the slab edge of the footing by more than 15mm on the right-side exterior walls.
- (3) Inadequate site drainage that is insufficient to allow drainage away from the base/slab of the dwelling.
- (4) Incomplete plumbing works.
- (5) Non-structural masonry on the walls of the dwelling deviating for more than 3mm over any 2m in length.
- (6) Lintel masonry overhang on left side exterior wall.
- (7) Deviation or step in left side exterior wall adjoining brick surfaces.
- (8) "Structural damp" in "all areas" of the residential dwelling.
- (9) Holes in external walls (referred to as a "minor defect").
- (10) Cracking in footpath (referred to as a "minor defect").
- (11) Drummy external tiles proximate to garage (referred to as a "minor defect").
- (12) Water staining in sections of the external walls (referred to as a "minor defect").
- (13) Insufficiently sized screens on windows (referred to as a "minor defect").

- (14) Trees overhanging gutters, causing excessive leaf debris (referred to as a “minor defect”).
- (15) Roof plumbing spreader missing (referred to as a “minor defect”).
- (16) Grout missing in areas of the balcony tiling (referred to as a “minor defect”).
- (17) Joint sealant material of kitchen benchtop not of a matching colour and not full sealed (referred to as a “minor defect”).
- (18) Bathroom waterproofing “inadequate.”
- (19) Bathroom tap showing evidence of “water hammer” (referred to as a “minor defect”).
- (20) Bathroom window not latching (referred to as a “minor defect”).
- (21) Loss fittings and fixtures in bathroom 3 (referred to as “minor defects”).
- (22) Efflorescence on external brickwork (referred to as a “minor defect”).
- (23) Door edge sealing of external door leading to main bathroom does not have all sides sealed.
- (24) Bedroom window “stiff to slide” (referred to as a “minor defect”).
- (25) No evidence of installation of termite management system.
- (26) Hot water system overflow not connected.

11 Mr Xue also comments that there were areas of the dwelling where there were “obstructions and limitations” which “impeded a full inspection” and it was recommended that a further inspection occur “once these areas are made accessible.”

- 12 Between about June 2021 and October 2022, there were various contacts and correspondence between the applicants and the director of the respondent, Mr Wahba, about the builder conducting an inspection and rectifying defects. According to Mr Wahba, he attended the site in about October 2022 to conduct an inspection in the presence of the tenant Mr Privan.
- 13 In late 2022, the applicants complained to NSW Fair Trading about defects in the premises.
- 14 On 5 December 2022, Mr Tuckwell, a building inspector from NSW Fair Trading, issued a rectification order on the respondent builder under s 48E of the HB Act. The order was as follows:
- Item 1. Investigate and rectify cause of water entry into foyer and front office (sic). Inspection revealed bubble eight and delamination of plaster to ceiling and wall. Repair all damaged walls and ceilings caused by water entry ensuring colour and surface texture matches that of the surrounding area.
 - Item 2. Investigate and rectify water entry from roof above alfresco area. Inspection revealed water marks to brickwork above the alfresco aluminium sliding door that is consistent with water penetrating the roof space above. Replace any damaged material in roof space and ensure all flashings are in accordance with the Standard.
 - Item 3. Investigate and rectify water entry causing damage to dining room window. Inspection revealed bottom timber reveal has rotted leaving a large hole. Replace reveal with new timber and ensure all paint colour matches that of the remaining reveals.
 - Item 4. Investigate and rectify severe efflorescence calcification to both first floor balconies. Inspection revealed severe calcification to these areas and note that internal water damage is located below these balconies. Thereby indicating that balconies are holding water and/or membrane has failed.
- 15 According to the evidence of Mr Wahba in his affidavit of 7 August 2023, the builder engaged a sub-contractor roofer to attend the premises on 17 December 2022 to rectify the water ingress issues identified in Items 1-3 of the rectification order. Mr Wahba further asserts that a plumber attended the premises on 20 December 2022 to rectify the rainwater tank; and on 2-3 February 2023 a tiler engaged by the builder attended the premises to rectify the efflorescence staining to the front balconies. Mr Wahba also states that a

tiler also changed the floor waste in the bathroom, as requested by the applicants.

16 On 3 February 2023, the applicants' obtained a building investigation report from Mr Tuckwell, building inspector of NSW Fair Trading. That report was to ascertain whether the rectification order had been complied with. The date of compliance with the rectification order was 1 February 2023.

17 Mr Tuckwell's report is summarised as follows:

Item 1-Some unrepaired damage to walls and ceiling still existed.

Item 2-The builder had performed remedial work to the soaker flashings above and provided video evidence. However, silicone seal to the masonry wall should have a pressure flashing installed with fixings at a maximum 100 mm. The current work is only a "temporary fix."

Item 3 – Rectification work has not been performed.

Item 4 – Efflorescence has been removed from tiles, but no other remedial work performed to eliminate water entry. The builder has advised that it will apply and epoxy grout, but that is not a waterproofing solution. Epoxy grout can provide a secondary barrier, however the main concern is the failure of the waterproofing membrane below the tiles.

18 On 2 March 2023, the owners commenced proceedings in the Tribunal. At that point in time, the owners were self-represented. The application sought an order to do work or services to the approximate value of \$200,000.

19 It is unnecessary for the purpose of this decision to set out in detail the procedural history of the matter before the Tribunal. Relevantly both parties were granted leave to be legally represented. There were a number of procedural directions hearings. The matter was listed for hearing on 5 March 2024, but that hearing was adjourned on 9 February 2024 with a costs order made against the owners in respect of the adjournment.

20 At a directions hearing 9 February 2024, Rosser PM made orders that relevantly included the removal of Mena Danial and Nazih Wahba as parties to the proceedings; the provision of a joint tender bundle; and the provision of a joint expert report.

- 21 The owners had filed and served Points of Claim; and the builder had filed and served Points of Defence. Both parties had engaged building consultant experts who had provide expert reports. The owners engaged Mr Xue (Jim's Building Inspections) and the builder engaged Mr Roberts (Cornerstone Building Consultancy).
- 22 Mr Xue and Mr Roberts conferred prior to the hearing, and prepared a joint expert report setting out the areas of agreement, and disagreement, in the form of a Joint Scott Schedule. That document identified 5 defect items. There was significant disagreement between the experts on the issues of whether or not there was a defect; method of rectification; and cost of rectification.
- 23 Mr Xue of opined that the cost of rectifying defects was a total amount of \$194,857. Mr Roberts opined that the cost of rectifying defects was \$16,060.
- 24 Prior to the hearing, the owners filed and served a written outline of submissions dated 6 May 2024.
- 25 The parties also filed a Joint Tender Bundle.
- 26 The matter proceeded to hearing on 6 May 2024.
- 27 At the hearing, Mr Pan and Mr Wahba were cross-examined. However, the cross examination was confined to a limited number of issues. Mr Xue and Mr Roberts were then extensively questioned, in joint expert evidence. Mr Privan was not required for cross examination.
- 28 At the conclusion of the hearing, parties were directed to file and serve written submissions (including submissions in reply) and file a jointly agreed transcript of evidence. Extensions to the timetable were granted, and the reply submissions were filed on 29 July 2024.

Applicants Points of Claim and Submissions of the Parties Regarding the Issues in Dispute

- 29 The owners Points of Claim identify that cause of action relied upon is breach of statutory warranty under s 18B of the HB Act (as extended to successors in title pursuant to s 18D), and that the owners seek a remedy under s 48O of the HB Act of either (a) a work order that the builder rectify defects; or, alternatively, (b) damages for the cost of rectification of defects if a work order is found to be inappropriate in all the circumstances.
- 30 The owners closing submissions acknowledge that the claim for breach of statutory warranties is limited to defects that fall within the definition of a “major defect” under s 18E of the HB Act. The owners closing submissions also state that the owners are “content” with a work order under s 48O of the HB Act that the builder rectify defects (as found) rather than an award of damages for the cost of rectification.
- 31 In this regard, the owners do not make any submission that the “preferred outcome” under s 48MA of the HB Act that the party responsible for performing the building works rectify the defects be departed from.
- 32 The builders closing submissions contain, in substance, two propositions. Firstly, the builder submits that the owners purchased the property as an investment property with knowledge of the defects at the date of purchase, or at a reduced price by reason of the existence of defects. On that basis, builder submits that there is no causal nexus between any breach of statutory warranty and any loss or damage to the owners. The builder relies upon *Allianz v Waterbrook* [2009] NSWCA 224 at [110]-[111] per Ipp JA in support of this argument, and submits that Mr Pan made concessions in cross examination regarding his knowledge of defects at the date of purchase, and the effect of those defects on the purchase price.
- 33 Secondly, the builder submits that the owners have failed to establish any “major defect” under s 18E of the HB Act. The builder submits that the Tribunal

should accept the evidence of Mr Roberts over that of Mr Xue, and, further, Mr Xue's evidence is not sufficient to establish a "major defect."

- 34 In reply submissions, the owners submit that the principle enunciated by Ipp JA in *Allianz v Waterbrook* at [110]-[111] does not prevent the owners from obtaining a remedy for the builder's breach of statutory warranties for a number of reasons. Firstly, at [112]-[113]; Ipp JA stated his remarks at [110] were made "generally" and that causation is a question of fact to be determined on a common sense basis. It was only if the purchaser acquired the property "in full knowledge of the defects that exist" that the "knowing and deliberate act" in purchasing the property constitutes "a new and independent cause of harm." Secondly, the owners refer to Appeal Panel decisions that consider the principles in *Allianz v Waterbrook* (*Deaves v Sigma Group NSW Pty Limited* [2023] NSWCATAP 94 and *McIntosh v Lennon* [2023] NSWCATAP 83) and submits that, although the owners of obtained a pre-purchase inspection report by Mr Xue dated 16 April 2021, the evidence does not support a factual finding that they had "full knowledge" of the defects, or their significance.

The Builder's Points of Defence

- 35 The builders Points of Defence Dated 8 February 2024 admits certain factual matters. The builder denies that it performed any defective work. Further, the Points of Defence assert that, if the builder did perform defective work, there is no causal nexus between the defects and any damage or loss of the owners, because the owners purchased the property with knowledge of the defects. It is also asserted that the owners failed to take reasonable measures to mitigate their loss (if any loss is established).

Evidence of Parties

- 36 The documents contained in the Joint Tender Bundle were admitted into evidence, together with the following additional documents:
- (a) Expert report of Mr Roberts dated 23 October 2023.

(b) Joint expert report of Mr Xue and Mr Roberts dated 6 May 2024.

37 The documentary evidence contained in the Joint Tender Bundle is summarised as follows:

Applicants

- (1) Affidavit of Mr Pan dated 13 September 2023, which contained documents including the reports of New South Wales Fair Trading previously referred to, and the building inspection report of Jim's Building Inspections (Mr Xue) dated 16 April 2021.
- (2) Statement of Mr Privan dated 13 September 2023. Mr Privan is the tenant who occupies the residential premises. He was not required for cross examination at the hearing.
- (3) Expert report of Mr Mehdinezhad (HMS Group) dated 14 September 2023. Mr Mehdinezhad is a quantity surveyor. He was not required for cross examination at the hearing. His report focuses on assessment of the cost of rectifying defects. Neither party referred to his report in their closing submissions, and it is unnecessary to set out in detail the contents of the report.
- (4) Expert report of Mr Xue dated 21 December 2023.

Respondent

38 The builder relied upon:

- (1) An affidavit of Mr Wahba dated 7 August 2023.
- (2) The expert reports of Mr Roberts (23 October 2023 and 28 February 2024).

Consideration

Applicable Legal Principles

39 Section 18B of the HB Act states as follows:

18B Warranties as to residential building work

(1) The following warranties by the holder of a contractor licence, or a person required to hold a contractor licence before entering into a contract, are implied in every contract to do residential building work—

(a) a warranty that the work will be done with due care and skill and in accordance with the plans and specifications set out in the contract,

(b) a warranty that all materials supplied by the holder or person will be good and suitable for the purpose for which they are used and that, unless otherwise stated in the contract, those materials will be new,

(c) a warranty that the work will be done in accordance with, and will comply with, this or any other law,

(d) a warranty that the work will be done with due diligence and within the time stipulated in the contract, or if no time is stipulated, within a reasonable time,

(e) a warranty that, if the work consists of the construction of a dwelling, the making of alterations or additions to a dwelling or the repairing, renovation, decoration or protective treatment of a dwelling, the work will result, to the extent of the work conducted, in a dwelling that is reasonably fit for occupation as a dwelling,

(f) a warranty that the work and any materials used in doing the work will be reasonably fit for the specified purpose or result, if the person for whom the work is done expressly makes known to the holder of the contractor licence or person required to hold a contractor licence, or another person with express or apparent authority to enter into or vary contractual arrangements on behalf of the holder or person, the particular purpose for which the work is required or the result that the owner desires the work to achieve, so as to show that the owner relies on the holder's or person's skill and judgment.

(2) The statutory warranties implied by this section are not limited to a contract to do residential building work for an owner of land and are also implied in a contract under which a person (the principal contractor) who has contracted to do residential building work contracts with another person (a subcontractor to the principal contractor) for the subcontractor to do the work (or any part of the work) for the principal contractor.

40 The principles applicable to whether a breach of the statutory warranties has occurred under s 18B of the HB Act were summarised by the Appeal Panel of the Tribunal in *Deacon v National Strategic Constructions Pty Ltd; National*

Strategic Constructions Pty Ltd v Deacon [2017] NSWCATAP 185 (*Deacon*) as follows (at [46]):

Although objective standards such as Australian Standards, the Building Code of Australia and the Guide are of significant relevance in establishing whether work has been performed in a proper and workmanlike manner (*Wheeler v Ecroplot Pty Ltd* [2010] NSWCA 61 at [10]), the absence of such evidence does not automatically mean a homeowner has failed to establish breach of statutory warranty. In our view, the relevant principle was succinctly stated by Senior Member Goldstein in *G MacFayden and Anor v G Tadrosse* [2014] NSWCATCD 194 at [46] as follows:

...[E]vidence that work does not comply with the Building Code of Australia would establish a basis for a finding that sub section 18B(c) of the Act has been breached. Evidence of the details in which work does not comply with the contractual plans and specifications would form the basis for a finding that sub section 18B(a) of the Act has been breached. Evidence of work not being carried out in a proper and workmanlike manner would in my view involve identification of the work in question, a statement of how the expert would expect it to be carried out in a proper and workmanlike manner and then identification of the factors which establish that the way in which the work has been carried out falls short of it being carried out in a proper and workmanlike manner. Evidence of this nature, if accepted, would form the basis for a finding that sub section 18B(a) of the Act has been breached.

41 As was also set out in *Deacon*, the Tribunal when considering whether breach of s 18B of the HB Act has been established must consider and make findings in respect of:

- (1) Whether the owner has established on the balance of probabilities that works have not been performed in accordance with s 18B of the HB Act.
- (2) If a 'defect' (in the sense of failure to comply with s 18B of the HB Act) is established, what is the appropriate method to rectify that defect.

42 The owners bear the onus of proving that the work is defective (i.e. that one of the statutory warranties has been breached, applying the tests set out in *Deacon*); the method of rectification necessary to achieve contractual compliance and that the method is a reasonable course to adopt; and (if damages are awarded) the cost of rectification. When considering the exercise of its discretion to make a work order under s 48O of the HB Act, the Tribunal

must consider principles of certainty, practicality and enforceability (*Catapult Constructions Pty Ltd v Denison* [2018] NSWCATAP 158 at [59]-[60]).

43 Additionally, in the context of determining whether damages or a work order is the appropriate remedy for defective work, the Tribunal must take into account that an order that the builder rectify defective work is the “preferred outcome” under s 48MA of the HB Act. That “preferred outcome” can be departed from in appropriate circumstances.

44 The appropriate method to rectify is considered in the context of the nature and degree of the relevant defect (*Deacon* at [57]-[59]). The method of rectification is the work necessary to achieve compliance with the contract, provided that method is a reasonable course to adopt (*Bellgrove v Eldridge* [1954] HCA 36; (1954) 90 CLR 613 at 617-618).

45 In *Tabcorp Holdings Pty Ltd v Bowen Investments Pty Ltd* [2009] HCA 8 at [17]; (2009) 236 CLR 272 the High Court held that the test for reasonableness outlined in *Bellgrove v Eldridge*:

“...tends to indicate that the test that the test of ‘unreasonableness’ is only to be satisfied by fairly exceptional circumstances. The example given by the court aligns closely with what Oliver J said in *Radford*, that is, that the diminution in value measure of damages will only apply where the innocent party is ‘merely using a technical breach to secure an uncovenanted profit’.”

46 However, the phrase “tends to indicate that the test of ‘unreasonableness’ is only to be satisfied in fairly exceptional circumstances” does not mean that the owners are not obliged to provide sufficient evidence to establish breach of statutory warranties and an sufficiently detailed scope of works for the rectification of the defect. That obligation was discussed in *Catapult Constructions*.

47 In *Metricon Homes Pty Ltd as trustee for Metricon Unit Trust v Lipari* [2024] NSWSC 566, Nixon J summarised the authorities at [176]-[178] regarding a what is “necessary” and a “reasonable course to adopt” as follows:

“In *The Owners of Strata Plan No 97315 v Icon Co (NSW) Pty Ltd* [2023] NSWCA 303 at [12], Bell CJ (with whom Meagher and Adamson JJA agreed) observed that the qualification as to reasonableness is not confined to the situation described in *Tabcorp v Bowen Investments*, stating that:

“While it is accepted that the qualification will only apply in ‘fairly exceptional circumstances,’ it is not confined to where a plaintiff is seeking to rely upon a technical breach to secure an uncovenanted profit.”

In that regard, his Honour quoted a passage from the decision of Gleeson JA (with whom White JA and Basten AJA agreed) in *Owners SP 92450 v JKN Para 1 Pty Ltd* [2023] NSWCA 114 at [67]-[70], which included, relevantly, the following observations at [70]:

“*Tabcorp* at [16] referred by way of an example of unreasonableness to the situation where the innocent party was ‘merely using a technical breach to secure an uncovenanted profit’, citing Oliver J in *Radford v De Froberville* [1977] 1 WLR 1262. Other examples include where the cost of the ‘proposed rectification is out of all proportion to the benefit to be obtained’: *Brewarrina Shire Council v Beckhouse Civil Pty Ltd* [2006] NSWCA 361 at [87]-[88], citing *South Parklands Hockey & Tennis Centre Inc v Brown Falconer Group Pty Ltd* [2004] SASC 81 at 90 (Debelle J); and *Scott Carver Pty Ltd v SAS Trustee Corporation* [2005] NSWCA 462 at [120] (Ipp JA); see also *Wheeler v Ecroplot Pty Ltd* [2010] NSWCA 61 at [81] (Macfarlan JA, McColl and Basten JJA agreeing). For a recent application of this principle in this Court, see *Renown Corporation Pty Ltd v SEMF Pty Ltd* [2022] NSWCA 233.”

In *Brewarrina Shire Council v Beckhaus Civil Pty Ltd* [2006] NSWCA 361 at [89], Tobias JA (with whom Giles and McColl JJA agreed) observed that:

“In summary, the authorities to which I have referred stand for the proposition that whether the rectification work is a reasonable course to adopt is dependent upon a finding of fact that the proposed work was reasonable in order to achieve the contractual objective. The rectification work would be unreasonable if it was out of all proportion to the achievement of that objective or to the benefit to be obtained therefrom.”

- 48 In respect of breach, and (if breach is established), method of rectification, the Tribunal must make factual findings. It is the owners who bear the onus of proof. Principles regarding factual findings are well established and flow from the High Court decision in *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336 at 361-362. As Gordon J stated in *Re Day* [2017] HCA 2; (2017) 340 ALR 368 at [15] and [18] (citations omitted):

“[15] However, the seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the

consequences flowing from a particular finding are considerations which must affect the answer to the question whether an issue has been proved to the reasonable satisfaction of the tribunal...

[18] The tribunal must feel an actual persuasion of the occurrence or existence of a fact before it can be found. Where direct proof is not available and satisfaction of the civil standard depends on inference, "there must be something more than mere conjecture, guesswork or surmise" — there must be more than "conflicting inferences of equal degrees of probability so that the choice between them is [a] mere matter of conjecture." An inference will be no more than conjecture unless some fact is found which positively suggests, or provides a reason in the circumstances particular to the case, that a specific event happened or a specific state of affairs existed."

49 Evidence is also to be assessed in the context of the ability of a particular party to adduce evidence on the relevant factual issue (*G v H* [1994] HCA 48; (1994) 181 CLR 387 at 391-392).

50 As discussed previously, a successor in title has the benefit of the statutory warranties under s 18B of the HB Act (s 18D of the HB Act). This matter does not involve a claim by the owners to enforce a statutory warranty that has already been enforced in respect of the particular deficiency (s 18D(2) of the HB Act).

51 There is no doubt that this matter involves a "building claim" for "building goods and services" under ss 48A and 48K of the HB Act.

52 Section 48K(7) of the HB Act states:

(7) The Tribunal does not have jurisdiction in respect of a building claim arising from a breach of a statutory warranty implied under Part 2C if the date on which the claim is lodged is after the end of the period within which proceedings for a breach of the statutory warranty must be commenced (as provided by section 18E)

53 Section 18E of the HB Act states as follows:

18E Proceedings for breach of warranty

(1) Proceedings for a breach of a statutory warranty must be commenced in accordance with the following provisions—

(a) proceedings must be commenced before the end of the warranty period for the breach,

- (b) the warranty period is 6 years for a breach that results in a major defect in residential building work or 2 years in any other case,
- (c) the warranty period starts on completion of the work to which it relates (but this does not prevent proceedings from being commenced before completion of the work),
- (d) if the work is not completed, the warranty period starts on—
 - (i) the date the contract is terminated, or
 - (ii) if the contract is not terminated—the date on which work under the contract ceased, or
 - (iii) if the contract is not terminated and work under the contract was not commenced—the date of the contract,
- (e) if the breach of warranty becomes apparent within the last 6 months of the warranty period, proceedings may be commenced within a further 6 months after the end of the warranty period,
- (f) a breach of warranty *becomes apparent* when any person entitled to the benefit of the warranty first becomes aware (or ought reasonably to have become aware) of the breach.

(1A) If a building bond has been lodged for building work under Part 11 of the *Strata Schemes Management Act 2015*, the period of 2 years specified for commencing proceedings for a breach of a statutory warranty for that work is extended until the end of 90 days after the end of the period within which a final inspection report on the building work under that Part is required.

(1B) Subsection (1A) does not limit any other law that permits the period for commencement of proceedings to be extended.

(2) The fact that a person entitled to the benefit of a statutory warranty specified in paragraph (a), (b), (c), (e) or (f) of section 18B has enforced the warranty in relation to a particular deficiency in the work does not prevent the person from enforcing the same warranty for a deficiency of a different kind in the work (*the other deficiency*) if—

- (a) the other deficiency was in existence when the work to which the warranty relates was completed, and
- (b) the person did not know, and could not reasonably be expected to have known, of the existence of the other deficiency when the warranty was previously enforced, and
- (c) the proceedings to enforce the warranty in relation to the other deficiency are brought within the period referred to in subsection (1).

(3) The regulations may prescribe defects in a building that are not (despite any other provision of this section) a major defect.

(4) In this section—

major defect means—

(a) a defect in a major element of a building that is attributable to defective design, defective or faulty workmanship, defective materials, or a failure to comply with the structural performance requirements of the National Construction Code (or any combination of these), and that causes, or is likely to cause—

(i) the inability to inhabit or use the building (or part of the building) for its intended purpose, or

(ii) the destruction of the building or any part of the building, or

(iii) a threat of collapse of the building or any part of the building, or

(b) a defect of a kind that is prescribed by the regulations as a major defect, or

(c) the use of a building product (within the meaning of the *Building Products (Safety) Act 2017*) in contravention of that Act.

Note.

The definition of *major defect* also applies for the purposes of section 103B (Period of cover).

major element of a building means—

(a) an internal or external load-bearing component of a building that is essential to the stability of the building, or any part of it (including but not limited to foundations and footings, floors, walls, roofs, columns and beams), or

(b) a fire safety system, or

(c) waterproofing, or

(d) any other element that is prescribed by the regulations as a major element of a building.

54 Work is “complete” under s 18E(1)(c) of the HB Act when it complies with s 3B of the HB Act. Section 3B relevantly states as follows:

3B Date of completion of residential building work

(1A)...

(1) The completion of residential building work occurs on the date that the work is complete within the meaning of the contract under which the work was done.

(2) If the contract does not provide for when work is complete (or there is no contract), the completion of residential building work occurs on *practical completion* of the work, which is when the work is completed except for any omissions or defects that do not prevent the work from being reasonably capable of being used for its intended purpose.

(3) It is to be presumed (unless an earlier date for practical completion can be established) that practical completion of residential building work occurred on the earliest of whichever of the following dates can be established for the work—

(a) the date on which the contractor handed over possession of the work to the owner,

(b) the date on which the contractor last attended the site to carry out work (other than work to remedy any defect that does not affect practical completion),

(c) the date of issue of an occupation certificate under the *Environmental Planning and Assessment Act 1979* that authorises commencement of the use or occupation of the work,

(d) (in the case of owner-builder work) the date that is 18 months after the issue of the owner-builder permit for the work.

...

(5) This section applies for the purposes of determining when completion of residential building work occurs for the purposes of any provision of this Act, the regulations or a contract of insurance under Part 6.

55 An occupation certificate was issued on 23 July 2020 (exhibit to the affidavit of Mr Wahba, JTB 124). There is no other evidence that establishes a different date of completion of the works pursuant to s 3B of the HB Act.

56 Accordingly, as the proceedings were filed in the Tribunal on 2 March 2023, the owners can only bring a cause of action for breach of statutory warranties in respect of a “major defect” under s 18E(1)(b) and (4) of the HB Act.

57 Although it was held in *Crystele Designer Homes Pty Ltd v Wood* [2024] NSWSC 1438 (*Wood*) (in particular, at [135]) that s 41 of the *Civil and Administrative Tribunal Act 2013* (NSW) (NCAT Act) can be invoked to extend time under s 18E of the HB Act to add further “non-major” defects when proceedings have already been commenced in the Tribunal within the 2 year time period for “non-major” defects”, that decision is distinguishable in the circumstances of this matter. In this matter, no Tribunal proceedings had been commenced in the 2 year period.

58 To the extent that there is any suggestion in *Wood* that s 41 of the NCAT Act can be used to extend the “non-major” defect period at large, that proposition is not supported by other authorities.

59 In *The Owners-Strata Plan No 87003 v Raysons Constructions Pty Ltd* [2025] NSWSC 66, Leeming JA stated as follows at [28] and [50]:

The effect of s 48K is tolerably clear. It cuts through the questions of construction which can arise when proceedings are commenced contrary to a time limitation (as evidenced by, for example, *David Grant & Co Pty Ltd v Westpac Banking Corporation* (1995) 184 CLR 265 at 277; [1995] HCA 43), and makes it plain that the lodging of a claim under Part 2C must be within the time specified in s 18E, in default of which NCAT lacks jurisdiction. Decisions of the Appeal Panel of NCAT have repeatedly so held: see for example *S & G Homes Pty Ltd t/as Pavilion Homes v Owen* [2015] NSWCATAP 190 at [53]; *Jandson Pty Ltd v James* [2021] NSWCATAP 274 at [118] and *Unique Commercial Group Pty Ltd v Cusumano* [2024] NSWCATAP 204 at [8].

...

Fourthly, s 18E(1)(b) provides that the duration of the warranty period is affected by the character of the damage resulting from the breach: six years if the damage amounts to a “major defect in residential building work”, otherwise two years. As was noted in *Parkview Constructions* at [92], it strains traditional notions of a cause of action to regard a plaintiff who complains of one major defect and one which is not a major defect as having only a single cause of action, because of the availability of different limitation periods.

60 Accordingly, as the owners’ Solicitor correctly submits, the owners’ claim for breach of statutory warranties cannot succeed unless the defects are “major defects” under s 18E(1)(b) and (4) of the HB Act.

61 In *Fisher v N Phillips and M Phillips t/as Arise Building Services* [2022] NSWCATCD 80, the Tribunal stated at [41]-[43]:

The Appeal Panel in *Ashton v Stevenson; Stevenson v Ashton* [2020] NSWCATAP 233 (*‘Ashton’*) considered the applicable principles for whether or not a defect was a “major defect” under Section 18E (1) (b) and (4) of the HB Act. Such principles are summarised as follows:

(a) The test under s 18E (4) of the HB Act has two parts. The first is that there must be a defect in “a major element of the building” attributable to one of the specified matters. The second is that the defect must “cause” or “is likely to cause” (a) the inability to inhabit or use the building (or part of the building) for its intended purpose; or (b) the destruction of the building or any part of the

building; or (c) a threat of collapse of the building or any part of the building (*Ashton* at [63]);

(b) Expert evidence may be necessary to establish the fact of the defect and the likely effect on the ability to inhabit the building or cause the destruction of the building. However, the homeowner may also give lay evidence on such issues, including matters such as observations about the absence of relevant elements of the work; the location of water staining; the fact of water ingress during a rain or flooding event; photographs of such matters; or other observations about which a non-expert could give evidence and which could rationally affect the determination of what is likely in the future (*Ashton* at [68]).

(c) Whether a particular defect is likely to cause the relevant consequences in the future is evaluated in the context of (a) how long the defect has existed; and (b) whether the defect has resulted in any damage that might indicate the likelihood the premises will become uninhabitable or destroyed in the future by reason of the defect (*Ashton* at [69]).

(d) The design life of the structure and materials used may be relevant considerations (*Ashton* at [70]).

(e) Determination of the matters in s 18E (4) (a) (i)-(ii) are questions of fact (*Ashton* at [130]-[131]). Evidence is required from which it can be concluded the defects will likely cause the specified outcome (*Ashton* at [134]).

(f) Defects in the drainage system (and the roof structure) designed to keep rainwater from entering the dwelling is a major element under s 18E (4) (c) of the HB Act; and evidence may establish defects are likely to cause the premises to become uninhabitable in the future due to flooding, even if such a rain event has not yet occurred (*Ashton* at [169]-[170]).

Further, the Appeal Panel stated in *Ashton* at [135]:

Whilst it is inappropriate to try and catalogue all evidence that might be relevant to resolving the issue of whether the defects are likely to cause the building to become uninhabitable or to be destroyed in whole or in part, it can be readily accepted that the fact of water ingress arising from one or more of the defects would be relevant even though such an outcome had not presently manifested itself. The nature, location and extent of the defects would also be relevant in assessing the likelihood of the prescribed outcome. Lastly, expert evidence assessing the likelihood of the particular defects causing the prescribed outcome would be relevant, it being noted that the evidence must be of a type which is “comprehensible and reach conclusions that are rationally based” in order to “furnish the trier of fact with criteria enabling the evaluation of the validity of the expert’s conclusion” .

In *Stevenson v Ashton* [2019] NSWSC 1689, the Supreme Court (Harrison AsJ) stated at [74]-[76] that the legal test for whether the defect in s 18E (4) of the HB Act is a “major defect” does not require proof that the defect is “presently manifested and dire” or “imminent”.

62 In *GMI Construction Pty Ltd v Keshavaraz* [2024] NSWCATAP 68, the Appeal Panel stated as follows regarding the basis of making factual findings that there was a “major defect” (at [62]):

The Tribunal was entitled to form its opinion about whether a major defect exists on the basis of expert evidence and was not required to rely upon evidence from the homeowners directly, but that evidence could be taken into account (*Stevenson v Ashton* [2019] NSWSC 1689 at [74]). Even if the Tribunal did not expressly rely upon oral evidence for its findings about whether the defects were “major defects,” the oral evidence could be relevant to our conclusion about whether the Tribunal’s determination that it had jurisdiction was correct. It may have helped to establish, for example, in combination with the expert evidence, that each of the defects associated with the items set out in the Scott Schedule caused the inability to inhabit or use parts of the home.

The Claimed Defects-Expert Evidence

Alleged Defect 1-Front Façade and Master Balcony Leak

Mr Xue’s Opinion

63 Mr Xue asserts, in his report of 21 December 2023, that there is an “active water leak on the inside” of the front window of the premises (also referred to as the “study room window”). On inspection, there was a “water mark and rust mark on the left side of the front window.” Mr Xue performed water testing of the window and moisture testing of walls. He asserts that there is water ingress “through the window frame.” This is in breach of National Construction Code (NCC) 2019 Volume 2 P2.2.2(b) “whereby the external wall including openings around windows must prevent the penetration of water that could cause undue dampness or deterioration of building elements”.

64 Mr Xue states that he then inspected the “main roof top balcony, which contained insufficient waterproofing, for reasons that included “insufficient termination of waterproofing and no waterproofing termination around pipework.” Mr Xue asserts that the inadequate waterproofing constitutes a failure to comply with Australian Standards AS4654.2-2012 and AS4654.2-2012.

65 Mr Xue asserts the appropriate method of rectification is to re-waterproof the entire balcony by way of works including installation of a new waterproofing

membrane in the balcony, together with other associated works. He further believes that, in respect of the front window of the premises, the whole “window system” has failed, and the whole window needs to be replaced. A scope of works set out in both Mr Xue’s report, and his comments in the Joint Scott Schedule.

Mr Roberts’ Opinion

66 In his report of 28 February 2024 (the body of which is brief, and the majority of which is set out in comments in a Scott Schedule) Mr Roberts agrees that there was visible delaminating setting tape and paint on the southern wall of the front study, approximately 1.3m above floor level. He agrees this was consistent with water damage “at some time in the past,” but the source of the water ingress could not be identified without further investigation.

67 Mr Roberts did not agree that the waterproofing membrane in the balcony needed to be replaced. According to Mr Roberts, Mr Xue’s opinion that waterproofing membrane upturns are defective is “nothing more than an unsubstantiated assumption.” He disagreed that the downpipe termination in the balcony slab was defective or non-compliant with Australian Standards, because the “pipe is also likely to be covered with the skirting tile and bonding...” which is sufficient to achieve compliance with AS 46454.2-2012”.

68 Mr Roberts asserts that without invasive testing, Mr Xue’s assumptions are flawed.

69 Mr Roberts agreed that there is water ingress at the front window, which was most likely due to a leak of the joints of the window transom directly above the window sill. He did not agree that window needed to be replaced.

Joint Scott Schedule

70 In the Joint Scott Schedule Report, both experts, in substance, maintained their position. Both experts attended the site and conducted water testing to the balcony, balcony wall and front window.

- 71 The experts were able to replicate a water leak from the balcony through the external face of the balcony wall above the entry, but there was no identified water ingress on the underside of the balcony slab above the study; through the study ceiling; or on the water damaged wall lining of the study wall.
- 72 The Joint Scott Schedule states that the experts agreed on the following:
- (1) The flashing to the brick wall appears to have failed, allowing water to track down the water cavity into the study below.
 - (2) There is a “technical breach” in relation to the height of the weepholes when measured from the finished floor level of the balcony floor tiling.
 - (3) The window to the study is leaking at the mullion allowing water penetration to the internal space of the study.
 - (4) There is no overflow installed to the balcony.
 - (5) There is no evidence of balcony waterproofing failure.
- 73 Mr Roberts accepts that there is water damage in respect of watermark to southern western wall of the front entry study; watermark and water damage to sealing of study; and water marks to concrete downturn in ceiling space above study ceiling. However, he asserts that further testing needs to be done to determine the source of the water ingress, and does not agree that the balcony requires rectification works involving removal and replacement of the waterproofing membrane.
- 74 Mr Roberts believes it was “agreed” at the joint expert inspection that the water ingress to the study was due to a defective cavity flashing in the southern wall of the first floor balcony. Mr Roberts sets out in the Joint Scott Schedule his opinion in respect of the scope of rectification works. He believes it is sufficient to replace the flashing over the length of the southern wall approximately 2.5 m in length, and he sets out a scope of work to do this as well as associated works

including installation of overflow to balcony, and repair of consequential internal damage to the ceiling and wall of the study.

- 75 Mr Roberts asserts that the cost of the balcony repairs is \$6,340, which, unsurprisingly, is significantly less than Mr Xue's costings in respect of re-waterproofing the entire balcony. Mr Xue remained of the view that there was a water leak from the balcony and that the appropriate methodology to rectify was to "re-waterproof" the entire balcony.
- 76 In respect of the front study window, Mr Xue asserts that the whole window, with associated works, needs to be replaced to ensure that it is adequately waterproofed. Mr Xue sets out in the Joint Scott Schedule the cost of window replacement as \$15,842.
- 77 Mr Roberts asserts that replacement of the window is "excessive and unwarranted," and all that is required is ceiling of the window frame, in circumstances where the leaking at the style "would suggest drainage holes in the extrusion of the same happy, locked and/or gaskets at the frame joints require rectification." He's thousand not believe there is any evidence to substantiate the whole window has failed or requires replacement. Mr Roberts cost of servicing the window is \$810.
- 78 In essence, both experts agreed that there was water ingress. The methods of rectification proposed by the experts are vastly divergent. Mr Xue asserts that the whole balcony needs to be "re-waterproofed" by work including the replacement of the entire waterproofing membrane and the whole window needs to be replaced. Mr Roberts asserts that all that is required in respect of the balcony is to remove and replace 2.5 m of cavity flashing; rectify any damage to the vertical upturn of the waterproof membrane (with associated works) and the window requires a minor "service" involving the resealing of the window transom joints.

Item 1-Findings

Is The Defect a Major Element of the Building?

- 79 The Tribunal accepts there is a defect. Both experts agree that there is water ingress into the building by reason of failure of the flashing of the brick wall and that the window to the study is leaking at the mullion. This, of itself, is sufficient to establish a breach of applicable Australian Standards regarding prevention of water ingress into the dwelling, and additionally, that the works have not been performed with due care and skill.
- 80 The defect is a “major element” of the building within the definition under s 18E(4) of the HB Act, as it involves waterproofing.

Does The Defect Cause, Or Is Likely To Cause The Inability to Inhabit or Use the Building (or Part of the Building) for Its Intended Purpose; or The Destruction of The Building or Any Part of the Building; Or The Threat of Collapse of the Building Or Any Part of the Building?

- 81 There is no evidence or submission that s 18E(4)(b) or (c) applies. Regrettably, neither party’s written submissions deal in any detail with s 18E(4)(a) nor do either experts address the criteria in s 18E(4)(a) in any detail. Rather, the parties briefly submit that either there is a “major defect” (from the perspective of the owners) or there is no “major defect” (from the perspective of the builder) without the evidence and submissions giving detailed analysis of the matters to be addressed in s 18E(4)(a).
- 82 However, irrespective of the lack of focussed evidence and submissions on the issue of s 18E(4)(a), the Tribunal must address that provision and make findings.
- 83 The evidence of Mr Privan regarding issue of s 18E(4)(a) (which was not challenged by way of the builder requiring Mr Privan for cross examination) mostly focusses upon his interactions with Mr Wahba regarding the builder returning to the premises to do work. That evidence is peripheral, at best, to the issues for consideration under s 18E(4)(a). However, relevant to s 18E(4)(a), Mr Privan states:

- (1) When it rains the premises feels damp. Rainwater “gushed” into the entrance hall “like a waterfall,” and water was “coming down heavily on the kitchen wall.” The granny flat “also has water leaks on the main ceiling” (para [7]).
- (2) There are “many issues with water ingress, dampness and moisture.” Water is still seeping into the entrance hall and kitchen wall when it rains” (para [15]).
- (3) The entire wall of the office space near the entrance hall has bubbles due to wetness and moisture when it rains heavily. The ceiling of the entrance hall is stained and bubbled because when it rains water comes in and flows across the ceiling of the entrance hall. When it rains the moisture swells the wooden entrance and internal doors which makes it difficult to open and close the doors to in the property due to dampness. There are water marks all over the kitchen wall under the patio. The flooring in the perimeter of the lounge is failing apart.” (para [21]).

84 The Tribunal has considered this evidence. However, a difficulty is that the evidence of Mr Privan is very broad and does not refer to specific water ingress events. There are no photographs of water entering the premises and “gushing...like a waterfall.” Further, Mr Privan’s evidence is not consistent with the expert evidence. Even the owners expert Mr Xue does not refer to the type of extensive water ingress that Mr Privan’s statement refers to. Accordingly, Mr Privan’s evidence is given reduced weight, even though he was not cross examined and neither party’s submissions referred to Mr Privan’s evidence.

85 Further, no submission was made by the owners in the closing submission that Mr Privan’s evidence supports a finding that the defects cause, or are likely to cause, an inability to inhabit the premises (in whole or part); or an inability to use the premises for its intended purpose (in whole or part).

86 The Tribunal accepts, based on an assessment of all of the evidence, that the water ingress through the brick cavity flashing at the front wall is causing or may

cause in the future, destruction of the building. There is evidence of damage in the Joint Scott Schedule.

87 The next issue is what is the appropriate method of rectification. As discussed previously, the relevant legal test is what is necessary to achieve compliance with the contract (including the statutory warranties incorporated into the contract) and a reasonable course to adopt.

88 There are two areas involving rectification. The first is the balcony and front facade. The second is the front window.

Balcony/Front Facade

89 In respect of the balcony, the Tribunal does not accept the opinion of Mr Xue that complete re-waterproofing of the balcony (involving work including removal of tiles; replacement of waterproofing membrane and reinstatement works) is a necessary and a reasonable course to adopt to rectify the defect.

90 In respect of the Joint Scott Schedule, it is notable that water testing of the balcony was performed, and there was no evidence of balcony waterproofing failure.

91 Mr Xue asserts that weepholes being installed in the balcony “too low” is a critical reason for re-waterproofing the balcony. Mr Xue (and Mr Roberts) gave extensive expert evidence at the hearing on Item 1, which formed a substantial part of the joint expert evidence at the hearing. Mr Roberts asserts that the level of the weepholes is a “technical breach.”

92 Mr Xue justified his opinion that the whole of the balcony needed to be re-waterproofed as a ‘systemic’ rectification that would ensure there were no future water ingress issues. Mr Xue also asserted in joint expert evidence that the potential existed that the waterproofing membrane had insufficient termination. Mr Roberts did not agree there was insufficient termination of the waterproofing membrane. Mr Xue asserted that there could be water ingress from “more than one place” but his evidence was not detailed as to where those places were,

and how completely re-waterproofing the balcony was justified in all the circumstances.

- 93 Both experts agreed the balcony did not have an overflow, but Mr Roberts addressed that issue and included rectification of that issue in his scope of works.

Nature of Defect and Appropriate Method of Rectification

- 94 The critical enquiry is what is necessary to achieve compliance with the contract and a reasonable course to adopt.

- 95 In all the circumstances, the proposed methodology of Mr Xue to re-waterproof the entire balcony is in excess of what is necessary to achieve compliance with the contract and a reasonable course to adopt.

- 96 The owners submit that the method of rectification of the balcony by Mr Roberts contains a scope of works that is too vague and indeterminate. The Tribunal does not accept that submission. Mr Roberts scope of works is sufficiently detailed.

- 97 The Tribunal accepts the evidence of Mr Roberts that what is necessary to achieve compliance with the contract and a reasonable course to adopt is as follows:

- (1) Install protection to the existing surface of the balcony in the work area.
- (2) Carefully remove skirting tile above 2.5 m length of wall.
- (3) Remove and replace 2.5m length of cavity flashing.
- (4) Rectify any damage to vertical upturn of waterproof membrane by lapping to existing using a compatible membrane in accordance with Manufacturer's recommendations.

- (5) Reinstate skirting tile of wall to match existing.
- (6) Instal overflow to balcony (as per paragraph 8.1.7 of CBC Report dated 28 February 2024)
- (7) Repair consequential internal damage to ceiling and wall of study (as per paragraph 8.1.4 of CBC report dated 28 February 2024).

Front Window

- 98 Both experts agree that there is water ingress through the window and it is causing damage.
- 99 In essence, Mr Xue believes the window “system” has failed allowing multiple points of water ingress, and so the whole of the window needs to be replaced. There was debate between the experts in the joint evidence at the hearing as to whether there was, or was not, a snap on angle for the transom/mullion/stile of the window.
- 100 Mr Roberts asserts that all that is required is a “service call” to the manufacturer to repair and re-seal the window frame at a very moderate cost. According to Mr Roberts, the “likely cause” of the water ingress is “a leak in the joint/s of the window transom directly above the window sill and not the sub-sill”
- 101 The salient part of the cross examination on this issue is contained at pp 54-55 of the transcript. Mr Roberts asserted that if it was a “single piece”, it “has to be determined where the water is coming from” before he would agree the window needs to be replaced; and that although weepholes were blocked, “the only place it has leaked was from the horizontal midsection, which as I said, has sections to it, including the outside beading and the rebate, all of which will allow water into that section”.
- 102 However, Mr Roberts also stated in his report and the Joint Scott Schedule that there were “high moisture readings” in the area of the window.

- 103 Having considered all of the evidence, the Tribunal is satisfied that the window is leaking from multiple areas; and that there is no snap on angle. The Tribunal accepts Mr Xue's evidence on the nature of the defect, which contains a detailed and consistent explanation.
- 104 The Tribunal accepts the evidence of Mr Xue regarding the nature of the defect, and that it is necessary to achieve compliance with the contract and a reasonable course to adopt to replace the front window.
- 105 Regrettably, Mr Xue did not prepare a separate detailed scope of works in respect of removal and replacement of the front window, but has incorporated the window replacement into the balcony re-waterproofing. The Tribunal has formulated a scope of works in respect of rectification of the window as best it can on the evidence available.

Alleged Defect 2-Dining Room Window Leak

- 106 This alleged defect involves water ingress in respect of the two floor to ceiling windows in the living room (adjacent to the dining room).

Mr Xue's Opinion

- 107 Mr Xue asserts that he observed water damage at the base of the window surrounds of the two windows. Mr Xue states that he removed the damaged section of the window sub sill and found cavity under the window with rusting reinforcement and the installed flashing was turned to the external.
- 108 According to Mr Xue, "the installed damp proof course and flashing under the windows has not been installed in accordance to (sic) NCC 2019 Volume 2, 3.3.5.8 whereby it must be finished 50 mm above finished ground level and attached to the window. He further asserts that there are no weepholes, and the external footpath falls back towards the building. Mr Xue asserts that the inadequate fall of the footpath is in breach of NCC 2019 Volume 2 3.1.3.3 which requires surface water must be diverted away from the building with the fall of 25mm over the first 1m.

109 Mr Xue also performed moisture testing; and observed a similar rust mark in the second window. He states that weepholes are blocked with render.

110 According to Mr Xue, the whole waterproofing system of the windows has “failed” and a “holistic” repair involves removing and replacing the windows to ensure they are adequately waterproofed, with associated works. Mr Xue sets out a scope of works in his report (and in the Joint Scott Schedule) to remove and replace the windows, and a cost of \$66,283 (this costing in the Joint Scott Schedule was revised from his original costing of \$43,347).

Mr Roberts Opinion

111 Mr Roberts states in his report that when he inspected the premises (on the second occasion) the sill reveal of the window frame to the dining area displayed “significant deterioration and damage consistent with moisture damage.” There was also damage to the concrete hob with a sheet Belcourt flashing visible in front of the hob extending from the seal of the window down the cavity onto the external skin of brickwork. Mr Roberts was unable to confirm damage to the concrete sill had occurred, or, if so, the cause. There was also visible corrosion through the paint finish of the setting angle on the external of the window sill of the lounge window. Mr Roberts stated the weepholes were “generally clear,” but the weepholes on the line of the cavity flashings were placed “in excess” of the requirements in AS 3700 and AS 4773.2. Mr Roberts did not agree that the falls in the path adjacent to the windows were inadequate or causing water ponding.

Joint Scott Schedule

112 In the Joint Expert Report, Mr Xue and Mr Roberts maintained their respective opinions. Mr Xue believed the whole window system needed to be replaced, with associated works, together with other works including clearing weep holes and realigning render to sills. Mr Xue also asserted that the concrete path adjacent to the windows needed to be removed and replaced, because it was diverting water towards the residence. Mr Xue provided a scope of works in his report, and in the Joint Expert Report.

113 Mr Roberts asserted that the replacement of the two windows “is excessive and unwarranted and can be satisfactorily addressed with servicing and necessary ceiling by the manufacturer of the window frame.” Mr Roberts believed the “leaking in the stiles” suggested that drainage holes in the extrusion were blocked or gaskets needed to be replaced. The cost of such works (involving repair/servicing of the windows and clearing of weep holes) was \$2,480.

114 Again, as with the water leak to front study windows and surrounding walls; and the water leak from balcony, both experts accepted there was water ingress, but the method of rectification was vastly different.

115 Item 2-Findings

Is The Defect a Major Element of the Building?

116 Both experts agree there is water ingress through the windows. Mr Roberts in the Joint Scott Schedule, stated that sill reveal of the window frame displayed “significant damage consistent with moisture damage” and there was “visible corrosion through the paint finish of the setting angle.”

117 In the Joint Scott Schedule, there was agreement that the windows were leaking from the mullion frame and that weepholes in the sub-sills were blocked or partially blocked.

118 The Tribunal accepts that the defect is a major element of the building as it involves waterproofing.

Does The Defect Cause, Or Is Likely To Cause The Inability to Inhabit or Use the Building (or Part of the Building) for Its Intended Purpose; or The Destruction of The Building or Any Part of the Building; Or The Threat of Collapse of the Building Or Any Part of the Building?

119 The Tribunal accepts that the water ingress through the windows is causing the destruction of part of the building, or is likely to cause such destruction. The evidence of the experts is clear that the water ingress is causing physical damage to the building.

Nature of Defect and Appropriate Method of Rectification

120 Again, the salient issue is whether replacement of the windows (and associated work asserted by Mr Xue, including increasing windows by 1 brick course; and removal and replacement of concrete path to address water being channelled back to the residence) is necessary to rectify the defect and a reasonable course to adopt. Mr Roberts asserts that “servicing” the windows by way of works involving installation of sealant and clearance of blocked and partially blocked weepholes is sufficient.

121 The questioning of the experts is contained at pp 67-77 of the transcript. In the course of that questioning, the following evidence was given:

Mr Roberts: If you put a new window in, your going to have a window with the same extrusion back in and if the joints leak, its going to have the same problem.

Owners Solicitor: Sure, but if you put a new window with a different extrusion, so a different system of window, then that issue may not arise, correct?

Mr Roberts: Well, it depends if the joints are the same.

Owners Solicitor: How many windows do you see with this problem occurring within six years of being installed?

Mr Roberts: Not many, I've got to say.

Owners Solicitor: Its not prevalent, is it?

Mr Roberts: No, its not prevalent. It's not common.

122 Again, as with Item 1, there was dispute between the experts regarding whether water ingress was only coming through the middle transom or through other areas of the window.

123 The Tribunal is satisfied that the windows are leaking in multiple areas, as identified by Mr Xue. Mr Xue has given a sufficiently detailed and concise explanation of the nature of the defect and the method of rectification for the Tribunal to accept his evidence on those issues. The Tribunal is not satisfied that, considering the extent of the defect and water ingress through the

windows, that the method of rectification proposed by Mr Roberts is appropriate.

124 Accordingly, the Tribunal accepts that it is necessary to replace the windows (with the associated works identified by Mr Xue) to achieve compliance with the contract, and a reasonable course to adopt. The Tribunal does not accept that removal and replacement of the windows (with associated work) is excessive and unnecessary to rectify the defect.

125 The appropriate scope of works to rectify is the scope of works set out at paragraphs 8.2.7 and 8.2.8 of Mr Xue's report dated 21 December 2023.

Alleged Defect 3-Leak To Living Room Corner

126 This is a defect item where there was little, if any, disagreement between the experts regarding the nature of the defect; the method of rectification; and the cost of rectification.

Mr Xue's Opinion

127 Mr Xue, in his report, stated that he observed active water leaking from the base of the building on the opposite internal (living room) corner due to a break in the cavity flashing, which caused moisture to penetrate the internal side of the brick wall. He observed a "significant amount of efflorescence mark to the rear brick wall above the leak area). He asserted that the ingress of moisture into the internal component of the building is in breach of NCC 2019 Volume 2 P2.2.2 and is causing destruction to the property.

Mr Roberts' Opinion

128 Although Mr Roberts criticised Mr Xue's methodology, he accepted that there was some water ingress due to inadequate cavity flashings.

Joint Scott Schedule

129 In the Joint Expert Report, both experts agreed that there was damage present at the southern corner of the lounge forward/living door opening.

130 Both experts agree regarding a repair methodology in respect of the cavity flashings. Although the Joint Expert Report contained a slight discrepancy in costing (Mr Xue asserting that the cost of repairs was \$2,680; Mr Roberts asserting that the cost of repairs was \$2,050), both experts agreed during oral evidence that \$2,365 (the midpoint between the two figures) was an appropriate cost.

Findings-Item 3

Is The Defect a Major Element of the Building?

131 Yes. It involves waterproofing.

Does The Defect Cause, Or Is Likely To Cause The Inability to Inhabit or Use the Building (or Part of the Building) for Its Intended Purpose; or The Destruction of The Building or Any Part of the Building; Or The Threat of Collapse of the Building Or Any Part of the Building?

132 The water ingress is causing some damage that is sufficient to be satisfied that that it is causing or is likely to cause, destruction of part of the building.

Nature of Defect and Appropriate Method of Rectification

133 They method of rectification that is necessary to achieve compliance with the contract and a reasonable course to adopt is the agreed scope of works that is set out in the Joint Scott Schedule.

Alleged Defect 4-Failed Waterproofing To Balcony Over Garage

134 This alleged defect involves the waterproofing of the first floor balcony.

Mr Xue's Opinion

- 135 Mr Xue, in his report, states that when he inspected the property he observed a large active water mark to the perimeter of the first floor balconies. There was a large amount of calcification from behind the tiled surface. There was damage and rusting to the electrical conduits and brackets.
- 136 Mr Xue states that the waterproofing membrane of the right side of the balcony had “not been turned down or turned up” in accordance with AS 4654.2-2012 2.8.2.1 Mr Xue also performed moisture readings of the top line of the internal side of the external balcony wall, which according to Mr Xue supported his opinion that the water leak to the left side of the balcony is not from the wall above, but a failure of the waterproofing at the base of the wall.
- 137 Mr Xue asserts that the balcony needs to be fully re-waterproof, including installation of new waterproofing membrane and associated works. He provides a scope of works in his report, and costs to the works in the amount of \$18,582.

Mr Roberts' Opinion

- 138 Mr Roberts, in his report, and agrees that there is calcification and active water marks adjacent to the balcony. However, he does not agree that there is a failure of the waterproofing membrane. He asserts that AS 4654.2-2012 does not require the waterproofing membrane to be turned down to the external face of the wall as “membrane system shall be designed and installed as appropriate for their intended application”. If the waterproofing membrane was turned down, it will be visible on the external face brick wall which “would not result in an aesthetically pleasing finish.” According to Mr Roberts, the waterproofing membrane at the southern end of the brick wall was extended to the external corner of the face brick wall.
- 139 Mr Roberts asserts there is no defect.

Joint Scott Schedule

- 140 The experts maintained the disagreement in the Joint Expert Report. Mr Roberts asserted that the mineral staining visible on external wall is not evidence any waterproofing membrane on the balcony has failed. Mr Xue asserts that the calcification is coming through from under the tile and waterproofing, which “is an indication that the waterproofing has been breached and failed.”
- 141 Mr Roberts does not believe there is any defect, and accordingly there is no requirement to do any rectification work. He does not comment on the costings of Mr Xue, or propose an alternative method of rectification if Mr Xue is accepted regarding the nature of the defect.
- 142 The evidence of the experts at the hearing is contained at pp 78-81 of the transcript.
- 143 In summary, Mr Xue did not believe that the waterproofing membrane had failed. Rather, it had not been installed in accordance with the applicable Australian Standard., which had caused water to travel underneath the tile and caused significant staining and calcification. Mr Roberts did not believe that water tracking underneath the tile down the glue joint caused sufficient damage, or likely future damage, to constitute a major defect.

Findings-Item 4

Is The Defect a Major Element of the Building?

- 144 Yes, it affects the waterproofing of the building.

Does The Defect Cause, Or Is Likely To Cause The Inability to Inhabit or Use the Building (or Part of the Building) for Its Intended Purpose; or The Destruction of The

Building or Any Part of the Building; Or The Threat of Collapse of the Building Or Any Part of the Building?

- 145 No. The evidence does not establish that the defect causes, or is likely to cause the inability to use or inhabit the building in whole or part; or a threat of collapse of the building; or the destruction of the building or any part of it.
- 146 The efflorescence/calcification on the outside of the building is unsightly. However, as Mr Roberts points out, there is no evidence of any damage to the walls; ceiling or other gyprock areas in proximity to the area of external calcification. There was some inconsistency between the evidence of Mr Xue in his report; and the evidence he gave during the hearing, regarding whether there had been a breach of the waterproofing membrane; or whether the waterproofing membrane had not been installed in accordance with the applicable Australian Standard.
- 147 The evidence does not satisfy the Tribunal that the waterproofing membrane has been breached such that there is water ingress into the internal part of the building proximate to the balcony. The external damage is not sufficient to find under s 18E(4) of the HB Act that there is a major defect.
- 148 Accordingly, the claim in respect of Item 4 is dismissed.

Alleged Defect 5-Bathroom of the Granny Flat

- 149 This alleged defect involves falls to the tiles of the bathroom floor and absence of a water stop angle in the shower area.

Mr Xue's Opinion

- 150 Mr Xue states that when he inspected the bathroom of the Granny Flat, he observed water damage to the base of the Granny Flat bathroom door frame. He performed moisture testing. He found a high level of moisture content.

- 151 He inspected the shower area, and found no water stop angle installed. He asserts the failure to install a water stop angle was in breach of AS 3740-2010 3. 13.4.
- 152 Mr Xue measured the fall in the bathroom floor tile area, and found no fall to the finished floor surface. He asserts this was in breach of AS 3958.1-2007. Mr Xue asserts that the waterproofing installed to the bathroom does not the performance requirements of NCC 2019 Volume 2 Pt 2.4.1 “and is likely to cause deterioration and damage to the building”.
- 153 Mr Xue asserts that the appropriate method of rectifying defects is to remove the tiles; install a new waterproofing membrane; and re-tile with associated fittings, fixtures, and install a water stop angle. He states that the cost of such work is \$17,044.

Mr Roberts’ Opinion

- 154 Mr Roberts asserts the base of the doorframe the bathroom displayed evidence of minor mould growth. However, moisture metre readings taken by Mr Roberts were within the normal range.
- 155 Mr Roberts agrees that there was a “technical breach” of Australian Standards in respect of the installation of the water stop at the shower screen, as while the shower floor was set down from the main bathroom floor area approximately 10 mm, the set out was not the required minimum 15 mm in height.
- 156 However, according to Mr Roberts, Mr Xue had failed to establish that the “technical breach” had caused a failure to perform the intended purpose, by way of any results of water testing of the shower recess area. Mr Roberts agreed that there was no water stop angle installed, which was a breach of Australian Standards.
- 157 In respect of the fall of the tiles, Mr Roberts partially agreed with Mr Xue in that there was no fall on the finished floor at the location shown in photos 87 and 88

of Mr Xue's report. However, Mr Roberts asserted that there was a "minor fall of 3 mm/m in the location shown in photo 88".

158 Mr Roberts asserts that Mr Xue had "not demonstrated any consequence of these breaches by water testing the shower and bathroom floor areas." According to Mr Roberts, if water testing showed that the waterproofing membrane and floor tiling is not containing water within the wet area as required, he would agree with the scope of works proposed by Mr Xue. Otherwise, he does not believe that the "technical breaches" of Australian Standards had caused any damage, and the performance of the bathroom in respect of waterproofing was adequate.

Joint Scott Schedule

159 In the Joint Expert Report, both experts maintained their position. However, there was a slight disagreement between the experts regarding costings. If Mr Xue's opinion on the issue of defect and methodology for rectification is accepted, Mr Roberts costs the works at \$13,694, rather than \$17,044.

160 No water testing of the shower area was performed by Mr Xue pursuant to his report. At the hearing, Mr Roberts stated that he and Mr Xue had discussed a water test as part of the joint expert conclave. No such test was performed.

Evidence at the Hearing

161 The evidence of the experts on this defect item is contained at pp 81-86 of the transcript.

162 Both experts agreed that falls in the tiles did not meet Australian Standards; but Mr Roberts assessment on his readings were that there were some falls. Mr Roberts did not accept there was any evidence of significant water ponding. Mr Roberts did not agree with Mr Xue's assessment of the moisture readings Mr Xue had taken, including the area near the door frame. Mr Roberts pointed out that there was nothing in the evidence of Mr Xue to indicate whether the shower

had been used in the immediate period prior to the moisture readings being taken.

163 Importantly, the report of Mr Xue contains photographic evidence showing water damage to the base of the bathroom door frame (p 371 of the Joint Tender Bundle). Mr Roberts, in his report, referred to “minor mould growth” at the base of the door frame.

164 The following evidence was given by Mr Roberts at the hearing (pp 84-85 transcript):

Owner’s Solicitor: Okay. But there’s also water damage to the door jamb. But you’re not saying the browns..

Mr Roberts: No, that’s the mould I’m talking about.

Owner’s Solicitor: Okay, so Mr Xue has applied a moisture reading to it and he’s found 99.9%. Would you agree that moisture reading is because water is being retained in the door jamb?

Mr Roberts: Well, if that reading is correct, yes, there is moisture at the base of the door, but...

Owners Solicitor: You have no basis, do you, to suggest that Mr Xue has been giving incorrect moisture readings using his equipment, have you?

Mr Roberts: No, and nor do I have to give falls proofs of mine either because I had that...

Owners Solicitor: I didn’t say yours was (sic) false. I haven’t even raised that issue.

Mr Roberts: I m just saying mine are totally opposite that.

Owners Solicitor: That’s right. But Mr Xue is showing you 99.9%with no water on the floor at the time he took his moisture reading.

Mr Roberts: Okay.

Owners Solicitor: So you agree that is fair to assume that the door jamb, being timber, is retaining water?

Mr Roberts: There’s water in the vicinity.

Owners Solicitor: You agree that it’s not good building practice to build a bathroom with zero fall?

Mr Roberts: No

165 When questioned by the builder's Counsel, Mr Roberts stated that there were, in his opinion not "zero" falls, but zero falls in one area (photograph 87 in Mr Xue's report) and a "minor fall of 3mm per meter" in another area (photograph 88 of Mr Xue's report).

166 In respect of moisture readings, Mr Roberts stated his readings were within normal range. He stated that Mr Xue's moisture readings could have been affected by recent use of the shower, or recent cleaning of the floors.

Findings-Item 5

Is The Defect a Major Element of the Building?

167 There is a defect, in the sense that the fall of the tiles and lack of a water angle stop does not meet applicable Australian Standards. That involves the waterproofing of the building, and so the defect is a major element of the building.

Does The Defect Cause, Or Is Likely To Cause The Inability to Inhabit or Use the Building (or Part of the Building) for Its Intended Purpose; or The Destruction of The Building or Any Part of the Building; Or The Threat of Collapse of the Building Or Any Part of the Building?

168 The Tribunal is satisfied that the defect is causing, or likely to cause, destruction of part of the building.

169 There is clearly inadequate water drainage in the shower and bathroom floor area.

170 The Tribunal accepts that there is water damage to the door frame. The logical explanation for this is that the frame has retained water, which has led to deterioration. That is consistent with the moisture readings taken by Mr Xue.

171 The Tribunal accepts Mr Roberts moisture readings are different. It is unnecessary to find that one set of readings is accurate and the other inaccurate. Both can be accurate at the time they were taken. Even if Mr Xue's readings were taken at a time proximate to the bathroom being used or cleaned,

this does not necessarily reduce the weight to be given to them. The whole point of a bathroom and shower is that it is going to be used from time to time, and cleaned from time to time.

- 172 If there was no, or little, unreasonable absorption of water in the structure (which is the inference the builder seeks to draw based on Mr Roberts' moisture readings) then no other logical explanation has been proffered for the water damage to the base of the door frame.

Nature of Defect and Appropriate Method of Rectification

- 173 The Tribunal accepts Mr Xue's method of rectification, which involves replacement of the tiles (and associated works including replacement of the waterproofing membrane under the tiles) so that the tiles have adequate falls and a water stop angle is installed is necessary to achieve compliance with the contract and a reasonable course to adopt.

The Respondent's Argument on Causation Based On *Allianz v Waterbrook*

- 174 The builder submits that the owners purchased the property with knowledge of the defects by reason of the pre-inspection purchase report by Mr Xue of Jims Building Inspections dated 16 April 2021. In this regard, the builder relies upon the decision of Ipp JA in *Allianz v Waterbrook* [2009] NSWCA 224; (2009) 15 ANZ Insurance Cases 224 (*Waterbrook*).
- 175 The basis of the submission is set out at para [4] of the builder's written closing submissions. Some reference is made to evidence given by Mr Pan in cross examination. Without repeating the submission verbatim, it is based on the owners (a) purchasing the property as an investment property for \$2.65m; (b) obtaining a pre-purchase report of Mr Xue; (c) knowing that there were various "major defects" and "minor defects" referred to in the report; (c) knowing that there was a "home warranty policy" available to "cover" the owners; (d) knowing that repairing defects would cost money and it would be more expensive to rectify major defects than non-major defects.

- 176 *Waterbrook* involved a retirement village. The builder who had constructed the village pursuant to a contract with the developer went into liquidation. The developer sold the village to Waterbrook, who was a successor in title. Allianz had insured the builder under a “home warranty insurance policy.” When Waterbrook purchased the village, there were some defective works that the builder had failed to rectify. Waterbrook made a claim under the policy for a monetary amount for the costs of rectifying the defects. Allianz refused to indemnify, because under cl. 9 of the policy the insurer was not liable “for any defects in the work which would have been reasonably visible at the time any successor in title acquired the dwelling”.
- 177 After discussion as to whether that policy was inconsistent with certain provisions of the HB Act and its Regulations, Ipp JA (with whom Hodgson JA agreed other than paras [75]-[86] of Ipp JA’s reasons) relevantly stated as follows about breach of statutory warranty proceedings brought by a successor in title (at [100]-[103]; [109]-[115] and [117]):

“I turn now to the general law. As mentioned, the ordinary measure of damages in contract for defective work is the cost of remedying the work. Claims for damages for breach of a statutory warranty are not claims for breach of contract in the strict sense, but I accept, as I have stated, that the same measure would ordinarily apply to such claims.

An issue arises as to whether the same measure applies to a claim by a successor in title who acquires a patently defective building, where the defects result from breaches of statutory warranties. There is, in such circumstances, a difficulty in applying that measure. The successor in title may have purchased the building at a discount that takes into account the cost of remedying the defects. Were that to have occurred it would be difficult to contend that the successor in title suffered a loss. Were that not to have occurred, it might be argued that any loss is due to the fault of the successor in title in overpaying for the building in full knowledge of its defects.

This leads to the question whether, assuming that the successor in title paid more for a patently defective building than it was worth, did the loss that the successor sustained arise from the breaches of statutory warranties? The answer to this question, in my opinion, is the key to the answer to question 2.

In *Alexander v Cambridge Credit Corporation Ltd* Mahoney JA said (at 361):

“Notwithstanding that a defendant’s act or omission has a causal connection with the damage of the person aggrieved, no liability arises if an independent intervening act or event in conjunction with the defendant’s act or omission has brought about the plaintiff’s damage

and the intervening act or event can be treated in a practical sense as the sole cause of the damage.”

As his Honour makes clear, this principle is of application under the general law, irrespective of whether the claim is brought in tort or contract. See also McHugh JA at 361-363. There is no reason to think that the principle does not apply to loss caused by breaches of statutory warranties under the Act.

...

In my opinion, applying the same reasoning, a successor in title who acquires a building in full knowledge of its defects, suffers no loss from the existence of those defects. In those circumstances, the builder's breach of statutory warranty could not be said to have diminished the successor's assets, nor increased its liabilities. Any adverse impact to the successor's financial position, and any loss to the successor, would result from the successor knowingly and deliberately paying more for the building than it was worth. The loss would be caused by the successor's own decision to purchase at the agreed price.

The observations in [110] are predicated on the “full knowledge” of the defects being not only knowledge of the existence of the defects but also knowledge of their significance. A party may know of the existence of defects (because they are patent), but may not appreciate - even acting reasonably - that major expenditure would be required to remedy them.

The remarks in [110] are made generally. I repeat that question 2 is couched in terms that bear no reference to any facts, agreed or otherwise. I proceed to consider how the principles of causation bear on the matters raised by the question.

Causation in contract is to be determined by commonsense principles: *Alexander v Cambridge Credit Corporation Ltd* at 358 per McHugh JA. I have explained why I do not regard the relevant legislation as providing for any different meaning to “loss” as would be attributed to the term according to the general law. Applying those principles, should it be found that Waterbrook acquired the Village in full knowledge of the defects that exist, I would conclude that Waterbrook would fail to establish causation and legal responsibility for its loss. In such circumstances, Waterbrook's knowing and deliberate act in acquiring the Village would constitute a new and independent cause of harm.

But, I repeat, question 2 is articulated in abstract terms without reference to any facts. Thus, the issue under question 2 is simply whether Limitation (9) - because it purports to exclude Allianz's liability for “defects which were reasonably visible at the time that [Waterbrook] acquired the [Village]” - is void by reason of “non-compliance and/or inconsistency” with the Home Building Act and the 1997 Regulation.

I have expressed the view that, in accordance with the general principles of causation Allianz would not be liable under the Policy for claims in respect of defects of which Waterbrook had full knowledge, in the sense I have described. In my view, however, the breadth of Limitation (9) is wider than that; in other words, it attempts to do more work than is achieved by general causation principles.

I have pointed out that where defects are patent a party, even though acting reasonably, might be unaware that major expenditure would be required to remedy them. The repair of patent defects that on their face appear to be trivial, might - on opening up the work - be found to require major reconstruction. In my opinion, applying general principles of causation, in such circumstances the knowledge of a successor in title of the patent defects might not be a new intervening cause. In that event, the chain of causation would not be broken and the successor would be able to prove that it suffered loss.

...

I would, however, reiterate that, on general causation principles, the Policy would still not respond to the claim of a successor in title who acquires a building in full knowledge (in the sense that I have mentioned) of its defects (as that successor would not suffer loss from the existence of those defects)."

178 In *Waterbrook*, Giles JA gave a forceful dissenting opinion that a successor in title should be deprived of their rights for breach of statutory warranties if they purchased a property with knowledge of defects. At [19]-[22] Giles JA stated:

"There is no sufficient reason why the person doing the residential building work should be relieved from liability if the defect due to non-compliance with the warranty was reasonably visible at the time of acquisition. The reasonable visibility would not eliminate the person's breach and its consequences. Nor would relief from liability foster consumer protection, and incentivisation properly to do residential building work. In this respect I agree with Ipp JA that double recovery from the person doing the residential building work, by the successor in title and then by the person for whom the work was done, would not be available: the express exception in s 18D did not mean that double recovery could otherwise be had. While recovery by a successor in title could benefit a developer, that can be regarded as subservient to protection of the successor in title as consumer.

Treating the acquisition of the dwelling with actual or constructive knowledge of the defect as the causal link would make protection of the successor in title as consumer a complex matter, and one in which the consumer may well not be protected.

Reasonable visibility of a defect as the criterion for recovery by the successor in title would be the beginning of a morass of factual inquiry, alien to consumer protection. Its theoretical justification, for which Allianz argued, is that when the successor in title acquired the dwelling the actual or constructive knowledge of the defect would be reflected in the purchase price. In many cases that would be contrary to the facts. Purchasers do not always see reasonably visible defects, and if they know of them any effect on the purchase price involves knowledge of the cost of rectifying the defects; that is notoriously often difficult to forecast. Further, if the successor in title is able to recover the cost of rectifying the defect from the person who did the residential building work or an insurer, the purchase price is unlikely to be affected, or may be affected only so as to reflect the expense and trouble of recovery. The theory is essentially circular.

I apprehend that the problem with the theoretical justification is to an extent acknowledged by Ipp JA, in his acceptance that in some circumstances the successor in title's knowledge of patent defects might not be a new intervening cause. Investigation of the circumstances in order to arrive at causation would lead into the depths of the morass. I doubt a legislative intention that a successor in title should have to undergo such an investigation. The preferable view, in my opinion, is that the successor in title's loss, ordinarily the cost of rectifying the defect, arises from breach of warranty because the successor in title is exposed to the cost of rectifying the defect. That is so whether or not the defect is reasonably visible at the time of acquisition.

- 179 The reasons of Ipp JA in *Waterbrook* were distinguished by the NSW Court of Appeal in *Walker Group Constructions Pty Ltd v Tzaneros Investments Pty Ltd* [2017] NSWCA 27; (2017) 94 NSWLR 108 (*Tzaneros*). In *Tzaneros*, Bathurst CJ (with whom Beazley P and Gleeson JA agreed), after setting out the relevant passages from Ipp JA and Giles JA, stated at [151]-[158]:

“Although in my opinion there is much to be said for the view taken by Giles JA, it is not necessary to consider whether the case was correctly decided.

This is first because the present case concerns an assignment of contractual warranties including as I have determined, the right to sue for past breaches. As was pointed out in *Renold supra* the assignee is entitled to recover damages of the same kind as the assignor could have recovered and steps into the shoes of the assignor for the purpose of pursuing the right vested in the assignor: at [26]. It is irrelevant in my opinion whether the assignee knows of the breaches or otherwise.

That is not to say that an act of the assignee could not break the chain of causation (for example, in the present case by using excess loads on the pavement). However, acquisition with knowledge of the defects, in my opinion, would not do so.

The position is quite different to *Lambert v Lewis supra* where a person who acquired an item of equipment with the benefit of a warranty deliberately made use of the equipment knowing it to be defective. It was the use of the equipment in those circumstances which broke the chain of causation in respect of the damage which ultimately eventuated.

Second, Ipp JA made it clear that what was required was that the successor in title had full knowledge of the defects, not only their existence but also of their significance: at [111]. In my opinion it could not be said that *Tzaneros* had such knowledge.

It is clear that Mr *Tzaneros* knew of the existence of cracks in the pavement. However, his evidence was that he was not aware there was a structural problem until 25 July 2006. Further, the primary judge found (Trial Judgment at [100]) that Mr *Tzaneros* did not know there was a design defect when *Tzaneros* acquired the terminal.

WGC sought to avoid the consequence of this finding by submitting that Mr Tzaneros was aware there was a structural issue. However, even that was not accepted by WGC at the time the purchase of the terminal took place. I have referred earlier in these reasons to the inspection carried out by Mr Wright in 2005 and the fact that WGC alleged at the time that damage was caused by the manner in which P&O used the terminal (at [142]) and that Mr Tzaneros was informed by WGC employees that the cracks were surface cracks or shrinking (at [143]). In these circumstances, it does not seem to me that it can be concluded that at the time of the acquisition of the terminal, Tzaneros was aware of the significance of the breach.

WGC also submitted that Tzaneros failed to act reasonably in not investigating the extent of the damage. It does not seem to me that any principle derived from Allianz extends to an assignee who has constructive knowledge by reason of failing to properly investigate the extent of a patent defect. In any event it was not suggested to Mr Tzaneros that he should have made further investigation and no evidence was led as to what reasonable investigations could have been carried out and whether they would have uncovered the significance of the defect.”

180 In *Deaves v Sigma Group NSW Pty Limited* [2023] NSWCATAP 94, the Appeal Panel referred to the decisions in *Waterbrook* and *Tzaneros*. Relevantly, a lot owner in a strata scheme had purchased a strata lot with the plans forming part of the conveyancing contract, but sought to argue (as part of the proceedings against the builder and developer) that there had been a breach of statutory warranty because the lot had not been constructed in accordance with the plans. The Appeal Panel held the Tribunal had erred in law by dismissing the breach of statutory warranty proceedings, because (at [70]-[71]):

“In any event, we do not agree that the Tribunal’s decision is an application of the majority decision in *Allianz*, let alone a correct application of that decision. This is because:

(1) The Tribunal did not analyse the matter by reference to any causation principle. Indeed, it makes no reference to the decision in *Allianz*.

(2) In contrast to the situation in *Allianz*, there were no patent defects in existence at the time when the appellants signed the contract for sale of the property.

(3) The consumer protection policy concern was different to that in *Allianz*. It could not be said that knowledge of the defects would have been reflected in the purchase price, or that the successor in title would obtain an unearned profit or that recovery for the successor in title would encourage a situation in which a developer could achieve a contract price that was more than the property was worth.

(4) The Tribunal did not apply a test of “full knowledge” of the defects, but instead applied a test of notice or assumed knowledge.

The Tribunal appears to have applied a limitation to the scope of the statutory warranty provisions in s 18B, s18C and s18D of the HBA that was not founded upon the terms of any legislative provisions or case authority, and which did not apply the effect of the statutory warranty provisions, which create new stand-alone rights, as confirmed by case authority. Instead, the Tribunal gave an unwarranted pre-eminence to the conveyance contract.”

181 In *McIntosh v Lennon* [2023] NSWCATAP 83, the Appeal Panel dismissed an appeal in relevant circumstances where the Tribunal had found, based on a pre-inspection building consultant report and representations made to the purchaser that the successor in title did not have full knowledge of the defects, and their significance, at the date of purchase. The Appeal Panel stated at [205]-[209]:

The Tribunal then said that it was comfortably satisfied that the respondents did not have full knowledge of the existence of the defects and their significance (per *Allianz*) because:

- (1) some defects were not known from the pre-purchase report or otherwise;
- (2) the limitations of the pre-purchase report, referred to above, had the effect that the respondents did not know the *significance* of the defects that they were aware of; and
- (3) the appellant provided them with explanations and reasons which disguised the *significance* of the defects of which they were aware.

The appellant called the Tribunal’s reasoning process a broad-brush approach and submitted that it was erroneous for the Tribunal to take that broad brush approach and “disregard the report in its entirety.” The Tribunal should have considered each defect, the extent to which it was described in the pre-purchase report, and the effect of any subsequent discussions concerning it and whether, given those matters, the respondents had knowledge of the relevant defect.

We do not accept the appellant’s characterisation of the Tribunal’s reasoning process, nor that the Tribunal disregarded the pre-purchase report “in its entirety.” Quite the opposite. The Tribunal went through the report and summarised its relevant findings. The Tribunal then noted the report’s limitations and made findings of what was said by the appellant to the first respondent.

Those factual findings were critically important to the central question whether the respondents had “full knowledge” of the defects, being not only knowledge of the existence of the defects but also knowledge of their significance. Thus, the respondents knew of the existence of at least some of the defects but the Tribunal found they did not appreciate their significance or that major

expenditure would be required to remedy them. The appellant's submissions overlook [111] of *Allianz* in that, in the examples the appellant sets out in his submissions, no attention is given to whether the respondents had *full* knowledge of the defects. That is, not only did they know of the existence of the defects but also knew of their *significance* and whether they appreciated that major *expenditure* would be required to remedy them.

It was not necessary in this case to undertake the detailed exercise submitted by the appellant. Or, rather, it was not erroneous for the Tribunal to approach the fact-finding task of deciding whether the respondents had full knowledge of the defects in the manner suggested by the appellant.

182 In *Gittany v Keusma* [2021] NSWCATAP 264, the Appeal Panel commented at [64]:

“...The intervening factor severing the causal link to otherwise entitle Watermark to sue Allianz was its "full knowledge" of the defects in the property before it was purchased...”

183 In *Vella v Mir* [2019] NSWCATAP 28, the Appeal Panel referred to *Waterbrook* briefly at [101]-[103], and concluded that the findings of the Tribunal were inadequate in respect of the causation issue (where a residence had been purchased with knowledge that a balustrade had not been installed) and whether the absence of a balustrade was a “major defect” under s 18E of the HB Act.

184 When the above authorities are analysed, it is apparent that:

- (1) The principles referred to by Ipp JA are causation principles, predicated upon a factual finding as to what is the cause of the damage and loss. Causation is determined on the basis of “commonsense principles.”
- (2) Although the NSW Court of Appeal in *Tzaneros* stated there was “much to be said” in favour of adopting the approach of Giles JA in *Waterbrook*, it was not prepared to hold that Ipp JA (supported by Hodgson JA) was wrong in his analysis of causation in the context of a successor in title relying on breach of the statutory warranties, because it was able to distinguish *Waterbrook* on the facts. Other State courts and Tribunals have referred to the principles discussed by Ipp JA as well as NCAT.

- (3) The critical enquiry is whether the chain of causation between the breach of statutory warranty and the damage or loss is broken. That involves consideration of whether the owners who purchased the property had “full knowledge” of the defects at the date of purchase, and their “significance.” As Ipp JA stated:

“A party may know of the existence of defects (because they are patent), but may not appreciate - even acting reasonably - that major expenditure would be required to remedy them...where defects are patent a party, even though acting reasonably, might be unaware that major expenditure would be required to remedy them. The repair of patent defects that on their face appear to be trivial, might - on opening up the work - be found to require major reconstruction. In my opinion, applying general principles of causation, in such circumstances the knowledge of a successor in title of the patent defects might not be a new intervening cause. In that event, the chain of causation would not be broken and the successor would be able to prove that it suffered loss.”

185 To assess the issue of causation, consideration needs to be given to the evidence of Mr Pan in cross examination; and the content of the pre-inspection report of Mr Xue.

186 The cross examination of Mr Pan is at pp 14-18. A significant component of the questioning involves objections by Mr Birch, Solicitor, on the questions asked by the builder’s Counsel, on a number of grounds (relevance, clarity, legal professional privilege) and the Tribunal giving reasons for its procedural rulings that certain questions be allowed.

187 Mr Pan agreed that he had read the report of Mr Xue prior to purchase. He agreed that he and the second applicant purchased the residence for \$2.65 million. He agreed that the second applicant and he engaged a conveyancing Solicitor. He did not agree that the conveyancing Solicitor have him advice about the premises having “major and minor defects.” The following exchange occurred:

Builder’s Counsel: You were present on the 19th of September in 2023 at the last occasion in this matter weren’t you, Mr Pan? You heard Ms Zheng say on that occasion that she consulted our conveyancer. And what I remember is that he mentioned is that we can actually still, well, claim these defects, even though we purchased it. Is that correct?

Mr Pan: Yes

188 The cross examination then moves on the pre-inspection report of Mr Xue. Mr Pan agreed that he had received the report and read it. He agreed that the report used the phrase “major defect.” He was then asked to respond to the propositions that a “major defect” would cost more to rectify than a “minor defect;” that he knew that the defects were going to “cost some money to rectify;” and that he knew from the conveyancer that “you could just claim these back, the cost of rectifying these alleged defects from the builder. Isn’t that right.”

189 There was an objection to this question. After that objection was dealt with, the builder’s Counsel moved on, but Mr Pan did not give an answer to that question such that he answered each of the propositions.

190 Rather, the following questions were answered by Mr Pan:

Builder’s Counsel: To repeat, you knew that you were effectively indemnified against the cost of rectifying the defects identified in the Jim’s Building Inspection report?

Mr Pan: It was not spoken to us.

Builder’s Counsel: But you just gave a representation that you didn’t receive, that you were not there, that it was Ms Zhen who received the advice from the conveyancer. But were you there?

191 It is not clear from the transcript whether Mr Pan, or his Solicitor Mr Birch, then spoke. However, the question was not clearly answered.

192 In any event, there was an objection that was ruled upon. The builder’s Counsel then concluded the cross examination with the following exchange:

Builder’s Counsel: Mr Pan, you previously said about five minutes ago that that (sic) was not spoken to by the conveyancer. That was your line. That suggest you were spoken to by the conveyancer. Is that correct?

Mr Pan: No, that is not. I can rephrase.

Builder’s Counsel: Please.

Mr Pan: My partner, Melody, did not tell me the home warranty would cover up.

Builder’s Counsel: What did your partner tell you?

Mr Pan: The home warranty policy exists to take action.

Builder's Counsel: You still went ahead and bought the property. Isn't that right?
No further questions.

- 193 In cross examination, Mr Pan was not taken to the relevant parts of the report of Mr Xue, and asked what he understood from reading that report about what were the defects in the residence and how much it would cost to rectify them. He agreed that he had read the report before deciding to purchase. However, there was no detailed exploration as to what his state of knowledge was about the defects referred to in that report, or what it would cost to rectify them, when he made the decision to purchase the property.
- 194 The questions regarding "home warranty policy" were also confusing, and little weight can be given to the answers. "Home warranty insurance" under the HB Act involves a policy of insurance taken out by a builder in accordance with its obligations under the HB Act to cover non-completion and failure to rectify breach of statutory warranty defects in circumstances where a builder becomes insolvent, dies, or disappears (see, in particular ss 92 and 99 of the HB Act). It does not automatically indemnify a builder for any and all defects such that an owner suffers no loss if they purchase residential premises that contain defects.
- 195 It was also never put to Mr Pan that he had considered the existence of defects when purchasing the property and this had been taken into account by way of a "discount" in the purchase price.
- 196 The mere fact that a purchase or a premise who has obtained a pre-inspection report that refers to defects in the building knows that the owner "take action" (which may, or may not, be successful) against the builder is not a basis for finding (directly, or by way of inference) that the purchased the premises with "full knowledge of the defects and their significance."
- 197 The pre-inspection report of Mr Xue dated 16 April 2021 refers to various defects, and categorises them as "major" and "non-major". However, it does not contain a detailed explanation of the cause of each defect. The report does not

contain a scope of works to rectify each of the defects identified. The report also does not provide any costings for the rectification of defects.

198 The report also refers to various further investigations which are recommended to ascertain the extent of the defects.

199 The report also contains a number of disclaimers, or caveats in respect of the limitations of the report, and its contents. They are set out at JTB 448-450. Examples of such disclaimers are:

“If this Report has identified a medium or high risk rating for the undetected defects, we strongly recommend a further inspection of the areas that were inaccessible. This may include an invasive inspection that requires the removal or cutting of walls, floors, or ceilings.

If the Property has been vacant for a period of time, moisture levels or leaks may not be detectable at the time of the inspection because often only frequent use of water pipes (showers, taps et cetera) result in a leak being identifiable. We advise further testing on pipes and water susceptible areas (such as the bathroom and laundry) after more frequent use has occurred.

...

The identification of moisture, dampness or the evidence of water penetration is dependent on the weather conditions at the time of inspection. The absence of dampness identified in this Report does not necessarily mean the Property will not experience some damp problems in other weather conditions audit roofs, walls or wet areas are watertight.

Where the evidence of water penetration is identified we recommended detailed investigation of waterproofing in the surrounding area monitoring of the affected area over a period of time to fully detect and assess the cause of dampness.

...

This Report is not a warranty or an insurance policy against problems developing with the Property in the future. Accordingly, a preventative maintenance program should be implemented which includes systematic inspections, detection and prevention of issues. Please contact the inspector who carried out this inspection for further advice.

...

We don't provide advice on the cost of rectification or repair unless specifically identified in the scope of the Report. Any cost advice provided verbally or in this report must be taken as of a general nature and is not to be relied upon. Actual costs depend on the quality of materials, the standard of work, what price a contractor is prepared to do the work for an may be contingent on

approvals, delays and unknown factors associated with third parties. No liability is accepted for costing advice.”

- 200 The Tribunal does not accept the builder’s submission that the owners, having read the report of Mr Xue dated 16 April 2021, had full knowledge of the defects existing in the property at the date of purchase, and their significance.
- 201 The onus is upon the owners to prove that the builder’s breach of statutory warranties has caused them damage and loss. However, it is the builder who is arguing that the owners had full knowledge of the defects and their significance, such that the decision to purchase the property in its condition at the date of purchase was the cause of their damage and loss.
- 202 The Tribunal is satisfied, on the balance of probabilities, that the owners have proved the cause of their damage and loss is the breach of statutory warranties, rather than the decision to purchase the property. They did not have full knowledge of the defects or their significance.
- 203 To the extent that the builder is submitting that because the owners may have a remedy for breach of statutory warranties against the builder they had not suffered loss or damage, such a submission is rejected. That is not the test of causation referred to by Ipp JA in *Waterbrook*. As discussed previously, the owners have to prove the builder breached the statutory warranties; and that a particular method of rectification is necessary to rectify the defect, and a reasonable course to adopt as well as that if a work order is sought there is sufficient evidence for the Tribunal to make such an order with sufficient clarity and certainty. If the owners succeed in respect of all of those legal issues, then they have achieved a remedy to put them back in the position that they should have been had the breach not occurred. That does not mean they have not suffered loss or damage. It means they have proved breach, and the particular remedy necessary to put them back in the position they should have been had the breach not occurred, which is the well-established test for breach of contract (and breach of statutory warranties).

Appropriate Remedy-s 48MA and s 48O of the HB Act

- 204 In this matter, the owners' closing submissions state no award of damages are sought. Only a work order for rectification of defects is sought. Although the Tribunal has a discretion to award a remedy of a type that the owners do not seek, it is not appropriate to exercise such a discretion. The owners seeking a work order is consistent with the "preferred outcome" under s 48MA. Accordingly, it is unnecessary to consider whether the circumstances are such that the "preferred outcome" should be departed from (*Kurmond Homes Pty Ltd v Marsden* [2018] NSWCATAP 23; *Leung v Alexakis* [2018] NSWCATAP 11).
- 205 No issue has been raised that the builder is currently unlicensed to perform the necessary rectification work.
- 206 Accordingly, a work order under s 48O of the HB Act is appropriate, in accordance with the factual findings previously made.
- 207 The work order is set out in Annexure A of the decision.
- 208 Considering the extent of the works, the Tribunal is satisfied that 3 months from the date of this decisions is an appropriate period of time to complete the works.

The Issue of Costs

- 209 Under s 60 of the *Civil and Administrative Tribunal Act 2013* (NSW) (NCAT Act), parties are to pay their own costs unless there are "special circumstances" established sufficient to cause the Tribunal to exercise its discretion to depart from that principle and order the unsuccessful party pay the successful parties costs.
- 210 The exception to that principle is under r 38 of the *Civil and Administrative Tribunal Rules 2014* (NSW) (NCAT Rules). That applies where the amount "claimed or in dispute" in the proceedings exceeds \$30,000 (*The Owners Strata Corporation Strata Plan No 63341 v Malachite Holdings Pty Ltd* [2018] NSWCATAP 256). If r 38 of the NCAT Rules applies, the Tribunal can order

costs without “special circumstances” being established, and based on the well-established costs principle that, subject to specific exceptions, the unsuccessful party is to pay the successful party’s costs.

211 The Tribunal acknowledges that parties have not yet been heard on the issue of costs. However, it is open to the Tribunal to make a costs order and give the parties an opportunity to make an application to the Tribunal to vary that costs order within a certain time if they wish to do so (see, for example, *Wells Group Pty Ltd v Betts* [2025] NSWCATAP 70 at [78]-[86]).

212 The Tribunal is satisfied that it is appropriate to adopt the approach of making a costs order and then, if a party seeks to vary it, they can make such an application if they can establish a basis for a different costs order.

213 The Tribunal is satisfied that:

- (1) The amount claimed or in dispute in the proceedings exceeded \$30,000.
- (2) The owners (applicants) were the successful party, and that there is no obvious basis to only award them part of their costs, such as by way of a proportionate costs order.

214 Accordingly, the Tribunal orders the respondent to pay the applicants’ costs of the proceedings, subject to any future application to vary that costs order.

ANNEXURE A-SCOPE OF WORKS

Item 1--Front Façade and Master Balcony Leak

- (1) Install protection to the existing surface of the balcony in the work area.
- (2) Carefully remove skirting tile above 2.5 m length of wall.
- (3) Remove and replace 2.5m length of cavity flashing.

- (4) Rectify any damage to vertical upturn of waterproof membrane by lapping to existing using a compatible membrane in accordance with Manufacturer's recommendations.
- (5) Reinstall skirting tile of wall to match existing.
- (6) Install overflow to balcony (as per paragraph 8.1.7 of CBC Report dated 28 February 2024).
- (7) Repair consequential internal damage to ceiling and wall of study (as per paragraph 8.1.4 of CBC report dated 28 February 2024).
- (8) Remove and replace study window with new window and perform all necessary associated works to ensure window is correctly installed and the surrounding area is adequately waterproofed.
- (9) Restore and repaint any areas that require such work as a result of the removal and replacement of the study window.
- (10) Clean site and leave in tidy condition upon completion of work.
- (11) Make good any services affected as part of the work.

Item 2-Dining Room Window Leak

- (12) Cover and protect adjacent surfaces during rectification work.
- (13) Remove existing windows.
- (14) Increase up window lintels by one brick course.
- (15) Install concrete plinth to the full side of the window and at least 100 mm in height.
- (16) Concrete and reinforcement.

- (17) Waterproof to external side and top of concrete plinth.
- (18) Reinstall new replacement windows.
- (19) Remove concrete path to external.
- (20) Install new path with adequate drainage.
- (21) Re-patch wall around windows.
- (22) Repaint wall to the nearest architectural joints.
- (23) Make good any services affected as part of the work.
- (24) Clean site and leave in tidy condition upon completion of work.

Item 3-Leak To Living Room Corner

- (25) Provide cover and protection.
- (26) Support brick wall.
- (27) Remove two rows of brick to the base of the wall to allow the installation of new flashing to the brick wall in accordance with AS 2904 and AS3700.
- (28) Repair internal water damage to plasterboard.
- (29) Paint internal wall to replaced area to the nearest architectural joints.
- (30) Remove debris and clean site.

Item 4 Failed Waterproofing To Balcony Over Garage

No orders.

Item 5-Bathroom of the Granny Flat

- (31) Cover and protect adjacent surfaces during the rectification work.
- (32) Remove fixtures and fittings and shower screen, keep for reuse.
- (33) Remove floor tiles and one row of wall perimeter tile.
- (34) Remove waterproofing and grind concrete substrate to balcony with full to drainage.
- (35) Install waterproofing (including water stop angle).
- (36) Reinstall floor and wall tiles.
- (37) Reinstall fixtures and fittings.
- (38) Patch damaged door architrave.
- (39) Make good any services affected as part of the work.
- (40) Clean site and leave in tidy condition upon completion of work.

ORDERS

215 The Tribunal makes the following orders:

- (1) The respondent, St George Design & Construction Pty Ltd, is to perform the works set out in Annexure A of this decision at the residential premises of the applicants with due care and skill by 3 months from the date of this decision (the rectification works).
- (2) The applicants are to give the respondent and its sub-contractors reasonable access to the premises so that the rectification works can be performed.

- (3) The respondent is to pay the applicants' costs of the proceedings as agreed or assessed.
- (4) If either party seeks to vary order (3) above (the costs application):
- (a) the applicant to the costs application is to lodge and serve the costs application, including submissions limited to 3 pages and any evidence in support, within 7 days of this decision;
 - (b) the respondent to the costs application is to lodge and serve any submissions limited to 3 pages and any evidence in response within 14 days of this decision;
 - (c) the applicant is to lodge and serve any submissions in reply limited to 2 pages within 21 days from the date of this decision;
 - (d) the parties are to indicate in their submissions whether a consent to an order dispensing with an oral hearing of the costs application, and if they do not consent, submissions of no more than one page as to why an oral hearing should be conducted rather than the costs application being determined on the papers. If a hearing is not dispensed with, the parties will be advised of the date for the hearing of the costs application.

I hereby certify that this is a true and accurate record of the reasons for decision of the New South Wales Civil and Administrative Tribunal.

Registrar

